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ART. I.—*A Treatise on Maritime Contracts of Letting to Hire, by Robert Joseph Pothier: translated from the French, with notes and a life of the author, by Caleb Cushing.* Boston, Cummings & Hilliard. 8vo. pp. xxxvii. 170.

SIR WILLIAM JONES, in a letter to Lord Althorpe, written after one of those excursions to France, in which his inquisitive mind, grasping every species of intellectual attainment, combined the severer studies of political science and law with the luxury of oriental literature, states that he had, among his various pursuits, attended some causes at the *Palais*, and brought home with him *the works of a most learned lawyer, whose name and merit he should have the honour of making known to his countrymen.* This writer was Pothier, whom he afterwards noticed and imitated in his beautiful essay on the *Law of Bailments*, and of whose treatises on the different species of contracts he speaks in the following enthusiastic manner: 'I seize with pleasure an opportunity of recommending those treatises to the English lawyer, exhorting him to read them again and again; for if his great master, Littleton, has given him, as it must be presumed, a taste for luminous method, apposite examples, and a clear manly style, in which nothing is redundant, nothing deficient, he will surely be delighted with works in which all those advantages are combined, and the greatest portion of which is law at Westminster as well as at Orleans. For my own part I am so charmed with them, that, if my

undissembled fondness for the study of jurisprudence were never to produce any greater benefit to the public, than barely the introduction of Pothier to my countrymen, I should think that I had in some measure discharged the debt, which every man, according to Lord Coke, owes to his profession.' Among these treatises, of which Sir W. Jones speaks in terms of such lavish commendation, is included that of which our countryman, Mr. Cushing, has presented the public with a translation in the work now before us. It contains the essay on the Contract of Charter Party or Affreightment, on the subject of General Average, and on Seaman's Wages, three very important titles of maritime law. We have always regarded a translation of Pothier's treatises on the several species of express or implied contracts as a very desirable acquisition to the profession, on account of the high character of the author, and because the law of contracts is necessarily the same, or very nearly the same, in every civilized and commercial country; since it depends not so much upon positive institution, as upon general principles applicable to human conduct in an advanced stage of society. The common law of England, and the commercial jurisprudence of Europe, have been largely indebted to the civil code for these principles, which were first invented by the Roman jurisconsults, and have been subsequently applied to the new relations, to which the vast increase of maritime commerce in modern times has given rise.

In order fully to appreciate the value of the works of this illustrious lawyer, it is necessary to remind our readers of some of the circumstances of his life and character, which connect his fame with the most classical epoch of French jurisprudence, when the administration of justice was carried to the greatest perfection it ever attained under the old monarchy. Robert Joseph Pothier was born at Orleans in the year 1699, and after pursuing his other studies with great ardor and success, felt himself drawn to the science of jurisprudence by an impulse too strong to be resisted, and which men of genius always feel for that pursuit in which they are destined to excel. Before he was of age, he was appointed a judge in the Presidial Court of his native city, where he soon outstripped all his competitors. The first work, in which he engaged for the improvement of his favourite science, was one which might appal the firmest resolution, and which nothing but the

consciousness of possessing perseverance and industry to overcome all difficulties could induce a man of his unaffected modesty and diffidence to undertake. This was no less a task than the remodelling of the Pandects or digest of the Roman law, originally collected by Tribonian in that celebrated compilation, which has preserved the most truly useful production of ancient genius from the ravages of time; but which abounds in defects proceeding from carelessness, ignorance, and, as some have thought, gross corruption and the indecent levity of despotic power sporting with the most important interests of mankind. Opinions are divided as to the integrity, with which the minister of Justinian proceeded; but the fact is unquestionable, that, under the pretext of drawing order out of confusion, he and his associates have left a crowd of *antinomies*, or contradictory laws, and his general arrangement is extremely deficient. It was Pothier's aim to reconcile these inconsistencies, as far as possible, and to give a more luminous arrangement to the Pandects. Had he consulted his own judgment alone, he would undoubtedly have recast the entire body of the compilation, and given it that analytical form which modern skill imparts to elementary works of science. But the arrangement of the *books* and *titles* had become inveterately established, and so identified with the citations of the text by the civilians in their commentaries, that it could not be changed, without manifest inconvenience. The *laws* are however disposed in a new order, connected by general definitions, rules, and corollaries, filling up the numerous *lacunæ* which the compilers employed by Tribonian had left, and giving to the work that completeness and fulness of illustration which might have been expected from their hands. Wherever a rule, maxim, or definition is deficient in the original, (probably from its having been first applied to the decision of a particular case presented to the jurisconsult or the emperor whose name is affixed to the law,) our author has added whatever was necessary to make it perspicuous and of general application; without, at the same time, altering the original text, which is still preserved in Roman characters, whilst these additions are given in *italics;* except indeed where it was necessary to assert the purity of the text against the interpolations of Tribonian, or the carelessness and ignorance of subsequent transcribers. The alterations, which the venality or fickleness of Justinian subsequently introduced in the *code* and

novels, are explained, and carefully distinguished from the genuine productions of the golden age of Roman jurisprudence. To the whole work is prefixed a preface, containing a sketch of the history of the civil law; the series and sects of the jurisconsults; and that venerable and curious monument of antiquity, the fragments of the Twelve Tables. This preface was prepared by his friend M. de Guienne, advocate at the parliament of Paris, by whose continued encouragement he was stimulated to persevere to the end of this great work, which cost him the leisure of twenty years assiduously applied to its accomplishment. It appeared in the year 1748, in three large folio volumes, under the title of *Pandectæ Justinianeæ in Novum Ordinem Digestæ.*

He was also honoured by the patronage and approbation of Chancellor D'Aguesseau; who, with the liberality of true genius, encouraged the labours of the only man in Europe capable of emulating the lustre of his own attainments in this noble science. This great man invited Pothier to Paris for the purpose of conferring with him on his work; corresponded with him on the subject; examined many parts of it in manuscript; and when he was appalled at the magnitude of the undertaking, and began almost to despair of its ultimate completion, revived his drooping spirits, and encouraged him to persevere. D'Aguesseau was then at the height of his reputation; a lawyer without a superior, in the extent and variety of his attainments, combined as they were with a classical eloquence and all the graces of a finished style in speaking and writing. He appeared in the latter part of the brilliant age of Louis XIV, which, after all that has been said to depreciate it, must be considered as peculiarly fruitful in men of genius; was made one of the king's advocates at the age of twenty one years, and in his first essay at the bar gave such presages of his future eminence, that the celebrated Denis Talon, president *à mortier* of the parliament of Paris, said that he should be satisfied to *terminate* as that young man had *commenced* his career. Under the regency of the Duke of Orleans he was raised to the high dignity of chancellor, which in France, as in England, is a political, as well as a judicial office; and in which he distinguished himself, not only as a judge, but by his enlightened views of reform in the civil and criminal legislation of his country. After consulting the different parliaments and the most eminent lawyers of the kingdom, he drew

up several ordinances intended to produce uniformity on the subjects of entails or substitutions, donations, wills and testaments, and the jurisdiction and practice of the courts. His *plaidoyers* are also admirable models of forensic eloquence, adapted to the purposes of real business, and sufficiently ornamented, though far removed from the ambitious and florid style which has so much perverted the public taste in some parts of our country, which have been more ready to take encouragement from Curran than to take warning from Phillips. Such was the man who encouraged the useful labours of Pothier, and who selected him to fill the professorship of the *Droit Français* in the university of Orleans in 1749; which he combined with the office of judge, and performed the duties of both with extraordinary fidelity and diligence. He united oral instruction with his written lectures; and excited the emulation of the students by colloquial intercourse, conducted with great kindness and condescension, and by the institution of prize medals as a reward for distinguished merit. In 1740 he had published an edition of the *coutume* of Orleans with an elaborate commentary, and in 1760 he republished it with great additions and improvements. This work is marked by the same characteristics which distinguish his other writings, great clearness of conception, a methodical arrangement, and extreme neatness and purity of style; and it soon came to be regarded as a text book on the common law of all the provinces, though peculiarly applicable to that of Orleans. After he entered on the duties of his professorship, he found it necessary to investigate more minutely the different titles of the law; and he gave to the world the fruits of his labors in a continued series of treatises upon various subjects, and especially upon the law of contracts. Of this series, the first is an essay upon the law of contracts in general, *Traité des Obligations*, which has been translated by an English barrister of considerable acuteness and independence of thinking, Mr. Evans; but whose extensive gloss, (designed to illustrate the text by a comparison with the law of England, and some other discussions,) as Mr. Cushing observes, has perhaps 'doubled the cost of the book, without proportionally increasing its actual value.' It has also been very well translated in this country, by Mr. Martin, now one of the judges of the Supreme Court of Louisiana, who has also published several volumes of the decisions of that court, and a digest of the laws

of that state. We are not aware that any of Pothier's other works had been rendered into English before the present laudable undertaking of Mr. Cushing. The best editions of the original are that in twenty eight volumes duodecimo, that of 1781 in eight volumes quarto, and an edition published in octavo at Paris, since the revolution, collating the text of Pothier with the new codes.

The process, by which the common or unwritten law of France was formed, appears to have been very similar to that which produced the English common law; and the respective fortunes of each have closely followed the political fate of the two countries. In France, the great fiefs were so early and so long separated from the domain of the crown, and independent of its control, that the local custom of each particular province had time to grow up and ripen into a distinct law, which, when these fiefs came to be reunited to the crown, could not, without great inconvenience and popular discontent, be abolished or reduced to one uniform rule. Such, probably, would have been the fate of the English law, had the great vassals of the crown been able to assert or maintain their independence for any considerable length of time. The local customs, which now form only minute exceptions to the common law, would have spread over a larger surface, and embraced a greater variety of subjects. Of the ancient French customs, that of Paris is the most important to the general student of law, as it formed a sort of supplement to the rest, was applied in all the French colonies, and in that way has become interwoven into the laws of one of the states of this union; was early reduced to a text of great simplicity and beauty, and commented on by Dumoulin, and the other oracles of French jurisprudence. That of Orleans has derived an adventitious interest from the excellent commentary of Pothier; but the custom of Normandy may perhaps be considered the most useful to the student of our law; because that province being the source from which sprung those feudal institutions which were planted in England by William the Conqueror and his successors, and subsequently engrafted on the stock of the common law, a diligent examination of this custom will shed a strong and useful light upon the investigations of those who take pleasure in tracing the analogies of law. The French lawyers, in their turn, have regarded the text of Littleton and Bracton as illustrating the custom of Nor-

mandy, and other provinces where the feudal system had taken deep root. M. Houard, an eminent advocate at Dieppe, published at Rouen, in 1766, an edition of the text and a translation of the institutes of Littleton, with a glossary and notes collating it with the custom.

This unwritten or customary law, of which we have been speaking, prevailed in the northern provinces of France, where the usages of the Franks and other barbarians gained a more complete triumph over the Roman institutions, and which were therefore called the *pays coutumier;* whilst the civil, or Roman law, still survived in the southern provinces, which were therefore termed *pays de droit écrit.* The struggle which took place between these rival systems during the middle ages is a curious subject of investigation. Under one of the French kings of the second race, a controversy arose between the Abbey of St. Benoît and that of St. Denis, respecting the proprietary interest in certain *serfs*, which were claimed by both; and in order to adjust it, several conferences were held, at which certain doctors and judges assisted, and on the part of the king a bishop and a count. But the affair could not then be brought to a decision, because the judges of the *Salic* law were entirely ignorant of the Roman, which it was insisted ought to regulate ecclesiastical property. Another conference was ordered to be held at Orleans, where doctors of the civil law attended, and where it seems it was regularly taught; but the suit was at last hardly terminated without a judicial duel between the witnesses, a mode of ascertaining their credibility very common in that age.* On the revival of the study of the civil law, or rather of the Justinian code, it encountered the same sort of opposition in the *pays coutumier*, which it is well known the English common lawyers manifested when it was first introduced in England; and the Romish clergy do not seem to have felt the same interest in promoting its adoption. It was taught in the south of France long before it was introduced into the northern provinces; and when the study of it was first sought to be established in the university of Paris, Pope Honorius III. expressly prohibited it to be taught there, upon the ground that in those provinces the laity did not acknowledge the authority of the imperial law, and that the canon law was sufficient for the determination of ecclesi-

* *Fleury, Histoire du Droit Francais, p.* 40.

astical causes; and besides the study of the Roman law might divert the attention of the clergy from the holy scriptures. He therefore forbade all persons whatsoever from teaching the civil law at Paris, or in the neighbourhood, under the penalty of being interdicted from practising as advocates, and of excommunication; and it is a remarkable fact, that, until the year 1679, there was no professor of the civil law in that celebrated university.* It has commonly been supposed that the Roman law was entirely disused in the southern provinces after the firm establishment of the barbarian kingdoms in that part of Gaul, or at least that the text was forgotten or lost, and it only survived as a sort of traditionary usage or customary law, until the celebrated epoch of the discovery of the Pandects at Amalfi. But the Theodosian code could hardly have been obliterated; and when that of Justinian was revived, it was eagerly adopted in that congenial soil where the Romans left so many vestiges of their power and institutions, and was soon applied even in the *pays coutumier* to the improvement of the local usages: so that the entire law of France is strongly imbued with the spirit and principles of Roman legislation. These customs were at a very early period reduced to a written text, and thus delivered from that uncertainty which must always attend the administration of a system of laws resting in tradition, and depending upon the frail testimony of witnesses for its ascertainment. Such were the *Etablissemens de St. Louis*, published by that monarch in 1270, before his expedition to Africa, containing the customs of Paris, Orleans, and Anjou, as they then existed; the *Coutumes de Beauvoisis** compiled by Philip de Beaumanoir in 1285; the *Assises de Jerusalem*, composed by Godfrey of Bouillon for the government of the kingdom established by the French crusaders in Palestine, and the *Grand Coutumier*, containing a collection of all the customs of the different provinces made in the reign of Charles VI. But these works, adapted to the simplicity of the rude age in which they were compiled, were found to be too general in their provisions and too succinct in their style to satisfy the wants of a more advanced stage of society; and when Charles VII. had accomplished the great work of expelling the English from France, he set about an undertaking hardly less important to the nation, that of amending the cus-

* *Fleury*, &c. p. 67, 68. Decretal. Gregor. l. v, t. 33, c. 28.

toms and republishing them in a more ample and intelligible text. We are informed by Dumoulin, that the ultimate intention of this monarch was to reduce the whole to an uniform code for the entire kingdom; and De Comines attributed the same design to Louis XI, who is said to have expressed a strong desire that an uniformity of laws, and of weights and measures, might be established throughout the kingdom; 'qu'en ce Royaume on usât *d'une coutume, d'un poids, d'une mesure, et que toutes les coutumes fussent mises en François dans un beau livre.*'* But the accomplishment of these designs and wishes was reserved for our own times, and even the more indispensable work of revising the different customs and reducing them all to an accurate text was not achieved, until more than a century after the death of Charles VII.

Besides these two great sources of the laws of France, the *Droit Français*, and the Roman code, another was to be found in the statutes enacted by royal authority. These were called under the Merovingian and Carlovingian princes, *Capitulaires;* and under the third race they acquired the name of *Ordonnances*, although all letters patent, by which a general rule of conduct was prescribed, had the force and effect of law. At first these statutes were enacted by the king in an assembly of his barons, and with their advice and consent, in the same manner as the great vassals of the crown legislated within their fiefs, with the advice and consent of their vassals. And even after the independent and exclusive legislative authority of the crown came to be habitually exercised, many of the most important *ordonnances* were enacted in an assembly of the states general of the kingdom. Such, for example, is the celebrated *ordonnance* of Moulins, requiring all contracts, the consideration of which exceeds a hundred livres in value, to be in writing. This, like all the other French statutes, is drawn up with great simplicity and precision, and appears never to have given rise to those innumerable questions, which have occurred under the English statute of frauds, and which have perverted its original design, so as almost to make it a statute for the promotion of frauds. Indeed the extreme verbosity of the legislative style in the English parliament, which has been too much copied in this country, is attended with very great inconveniences, and entirely defeats the great end of a written

* *Fleury, &c. p.* 91.

code. Among the French *ordonnances*, those of Louis XIV. are the most beautiful models of legislation, especially the Commercial *ordonnance* of 1673, which was compiled by a commission of the most eminent merchants and lawyers under the direction of Colbert; and the celebrated Marine *ordonnance* of 1681, better known by the admirable commentary of Valin, which prepared the way for the elementary works of Pothier and Emérigon. It is only necessary to name these three illustrious men to assert the fame of their country in legal science.

To this immense pile was superadded the *jurisprudence des arrets*, or the decisions of the courts of justice, ascertaining the law, or having *proprio vigore* the force of law: for though judicial decisions and precedents never appear to have acquired that authority which they have in England, and in this country, nor to have contributed so much to swell the mass of law, and to fill the lawyer's library, yet they were regarded with very great respect, and the parliaments and other sovereign courts even asserted the right, in many cases, of promulgating what were called *arrêts reglementaires*, and had the force of general prospective enactments.

The revolution came, and swept away this vast accumulation of laws. To supply its place, temporary decrees were enacted by the different legislatures. The project of a general civil code was first drawn up by Cambacéres under the republic, and before the return of Bonaparte from Egypt. On the accession of the latter to the first consulship, his ardent and restless mind was turned to this important subject, and he aspired to combine the fame of the legislator with the glory which he had acquired in arms. The same object had before occupied the attention of the different national assemblies which rapidly succeeded each other; but they were too much distracted by external danger and domestic faction, to mature a work, to accomplish which required either the tranquillity of peace and social order, or the power of a single will. After the return of the first consul from the field of Marengo, he appointed a board of commissioners to draw up the plan of a code, which should supersede all the pre-existing laws concerning private civil rights. It consisted of MM. Portalis, Tronchet, Bigot-Preameneu, and Malleville, all eminent and experienced lawyers of the old school, who produced the *Projet de Code Civil*, which was printed, and submitted to

discussion in a mode adapted to free it from imperfections, to remove the objections to its general plan, to simplify its provisions, and render them more explicit, and produce the most perfect model of legislation the world had yet seen. The revolution, which had levelled in the dust almost all the social institutions of France, without discriminating the good from the evil, rendered the task comparatively easy. The innumerable customs of the provinces had disappeared; and the multitude of royal ordinances was superseded by decrees of the different national assemblies, which had not yet gained that reverence and strength which time alone can give to the works of man. From this mass of ruins the legislator might select such materials as he thought fit for the construction of his new edifice. The Roman law was alone left, having the efficacious authority of a code of *written reason;* an authority which it must always command wherever it has been once known and established. It furnished an inexhaustible repository of legal principles, adapted to the wants of a highly civilized and polished state of society, and had no small pretensions to be considered as the universal code of Europe. From this source then, from the ancient customary law of France, and especially from the works of Pothier himself, they drew the materials of their new creation.

After this work had been prepared, it was submitted to all the Courts of Appeal, who made their observations upon the plan, which were also printed, and the whole was then subjected to the revision of the Council of State. Each book was then separately submitted to the legislative body for its adoption, accompanied with an *exposé des motifs.* These *observations* of the judges, the *procés-verbal* of the deliberations in the Council of State, and the *motifs* form an excellent commentary upon the text of the code. The *Code de Commerce* which was principally compiled from, and includes the subject matters of the commercial ordinance of 1673 and the marine ordinance of 1681, was prepared in a similar manner; and after these succeeded the *Code de Procédure Civil,* the *Code Penal,* and *Code de Procédure Criminelle.* These still form, with a very few alterations, the law of France; and certainly if despotic authority exerted for the accomplishment of beneficent designs can compensate for the miseries inflicted by military ambition, the fame of Napoleon must in some degree be justified from the imputation of having wielded his power only for the destruction of mankind.

Whatever could be done by the mere private authority of an individual to give a methodical system, fixedness and uniformity to the complicated legal institutions of France, had already been accomplished by the genius of Pothier; and it is his highest praise to have anticipated that reform in the legislation of his country, which he did not live to witness, but to which his works have essentially contributed. After a long life of incessant labour and usefulness, he died 1772, leaving behind him a character of probity and virtue equal to his reputation for talents and learning.* His memory is still revered among his countrymen as the great oracle of their jurisprudence; and his fame has not been confined to his own age and nation, since his works are constantly cited at Westminster and Washington as of the highest authority in all questions not exclusively depending upon positive and local institutions. It therefore appears to us that Mr. Cushing could not have performed a more valuable service to the profession, than by naturalizing among us these works. The translation which he has executed of the *Contrats de Louage Maritimes* is done with great fidelity and exactness, and is an earnest of what may be accomplished, should the editor be induced to persevere in his undertaking, and extend it to the other treatises of Pothier. The notes which are appended to this part of the work are of very great value, and indispensably necessary to render the text intelligible to readers not familiar with the French and Roman law. Should the public patronage justify a continuation of the work, as we feel confident it will, we would recommend to Mr. Cushing to collate the citations of Pothier from the commercial and marine ordinances of Louis XIV. with the correspondent provisions of the new commercial code; as alterations more or less important have been made in the text of those ordinances by the latter compilation, which is now the law of France, and may sometimes be referred to in our own courts either as illustrative of the general maritime

* Public funeral services were performed in the cathedral of Orleans on his account, and the following inscription, in letters of gold, on a marble tablet, may still be read there:

Hic jacet ROBERTUS JOSEPHUS POTHIER, *vir juris peritia, æqui studio, scriptis consilioque, animi candore, simplicitate morum, vitæ sanctitate præclarus. Civibus singulis, probis omnibus, studiosæ juventuti, ac maximè pauperibus, quorum gratia pauper ipse vixit, æternum sui desiderium reliquit, anno reparatæ salutis* MDCCLXXII, *ætatis vero suæ* LXXIII. *Præfectus et Ædiles, tam civitatis nomine quam suo, posuere.*

law, or as of positive authority in questions of the *lex loci contractus*.

An interesting life of Pothier, collected with care from all the sources accessible in this country, is prefixed by Mr. Cushing to his translation. The following extract presents us with some personal anecdotes of this illustrious jurist.

'In the course of his long life, a short journey to Rouen and Havre was almost the sole interruption, which he voluntarily made, in the regular routine of his pursuits. While he was composing his great work on the Pandects, he was obliged to withdraw for a short time from his business, and retire to Lu,* for the benefit of repose and solitude. After he was appointed professor, he commonly spent the vacations at the same place, and was most assiduously employed at a time which others devoted to relaxation. Many of his treatises proceeded from Lu. His only amusements there were short walks after he had dined or supped, occasional visits, and riding on horseback, an exercise for which he acquired great partiality.

'He never indicated the least disposition to marry, saying that he had not sufficient courage for it, and that he wondered at those who had; thinking, besides, that celibacy was the wisest course for one who was frugal of his time and was exclusively devoted to tranquil and studious retirement. That he was thereby enabled to execute more is indubitable; since the very felicity of a married life would have drawn him away from less agreeable occupations, and diminished his opportunities for extended usefulness. No person ever availed himself more fully of his exemption from the cares of a family; for he was too careless of money and indifferent to the means of increasing his property, to attend to the management of his domestic affairs. He gave it up altogether to his servants, who governed his house, directed its expenses, and relieved him from every thing which did not indispensably demand his personal interposition. The same disregard of domestic concerns appeared, also, in his exterior, which was always neglected, and in his cabinet, where all his books and papers were thrown about in the greatest disorder. A man of such habits would obviously never seek after riches. This indifference for wealth did not proceed from the greatness of his fortune, which, however, was sufficient for his purposes; but from the disinterestedness of his character. In fact, he considered his superfluous possessions the patrimony of the poor as much as of himself; and therefore his charities were unwearied and boundless; he denied himself

* 'Lu is a town belonging to the dutchy of Montferrat in the north of Italy.'

all the luxuries of life, and sometimes almost its necessaries, that he might have the more to give in alms; so that the inscription over his grave was literally true, that for the sake of the poor, he himself submitted to live in poverty.

'Although second to none in that essential politeness of the heart, which consists in being indulgent towards the faults, and scrupulous of injuring the feelings, of others, he was destitute of all exterior politeness and elegance of manners acquired from intercourse with polished society. His diffidence was excessive and always rendered him timid and embarrassed in the company of strangers. His body was tall in stature, but ill-connected; in walking, it inclined on one side, and his gait was singular and inelegant; he sat with his legs twisted together in the most ungainly manner; and there was a peculiar awkwardness in his whole figure, conduct, and deportment. His manners were, therefore, so little prepossessing, that a transient acquaintance would have tended to weaken, rather than confirm, a person's respect for his character; and although the goodness of his heart and simplicity of his feelings would soon become apparent to strangers, it would be long, before they would perceive any thing in his appearance answerable to the greatness of his reputation.' pp. xxxi —xxxiii.

It was our design to have entered into the examination of some of the points of law, which form the subject of the notes, but we find none perfectly adapted to discussion in our pages. On page 147 is a curious note on the question, 'whether negro slaves might be thrown overboard to lighten a ship.' The last and longest of the notes contains a very learned and useful sketch of the history of maritime law and an account of the treatises on this subject. We extract the first part of it.

'*Note 55, p.* 136. The author of the foregoing work exhibits, at every step, a profound knowledge of his subject, and a knowledge which could not have been acquired without very extensive reading; but as he seldom cites any authority except the Pandects, the Marine Ordinance and Valin's Commentary; it may be well to take a view of the sea-laws and treatises, from which Pothier drew his opinions, and which constitute the foundation of our maritime jurisprudence.

'The most ancient system of marine laws referred to by writers is that of Rhodes. The people of this island acquired commercial reputation at an early period, and the usages, which they followed in the regulation of maritime affairs, were so wise and just, that they were adopted by Rome as soon as she had extended her dominion beyond the boundaries of Italy. (*Gravina, De*

Ortu Jur. Civ. p. 756 *et seq; Emérigon, Assur. préf.; Cicero pro L. Manil. c.* 18.) It is doubtful whether the Rhodians ever possessed a written code of these laws; and the pretended collection of them, which for a considerable time imposed on the literary world, (*Sea Laws, p.* 76 *et seqq.*) is now generally acknowledged to be spurious. (*North Am. Rev.* vii, 325, 226; *Peters' Adm. Decis.* ii. 479.) Indeed the Rhodian laws, as we learn from the famous rescript of Antonine, (*Digest. lib.* xiv, *tit.* 2, *l.* 9.) were a species of common or international law in the Mediterranean. (*Grotius de Jure Belli ac Pacis, l.* ii. *c.* 3.) The spirit of these laws was gradually incorporated into the Roman law, until they came to form the substance of the maritime laws of Rome. (*North Am. Rev.* vii, 327; *Selden. Mare Clausum, lib.* i, *c.* 10, s. 5; *Sueton. Vita Tiberii Claudii; Schomberg's Obs. on Rhod. law; Park on Insurance, introduc. p.* 3, 7; *Pastoret, Dis. sur l'Influence des Loix Maritimes des Rhodiens; Bynkershoek, ad leg. Rhod. c.* 8; *Heineccius, His. Jur. Civ. Roman. Germ.; Azuni's Maritime Law, pt.* i, c. 4, *art.* 2; *Boucher, Consulat de la Mer. tit.* i, *liv.* 1, *c.* 2, 4.)

'The next authority, therefore, on which the modern commercial law stands, is the Roman law, as it exists in the Digest and Code of Justinian. The general principles of justice, which the civil law teaches, are the soul of all our international and maritime regulations at the present day; and although the titles in the civil law exclusively devoted to nautical concerns are few in number, yet their sound wisdom, compressed sense, and apposite illustrations entitle them to the greatest consideration. Pothier, we have seen, adduces them whenever he has an opportunity. The most important of these titles in the Pandects are *L.* iv, *tit.* 9, *Nautæ caupones, stabularii,* &c.; *L.* xiv, *tit.* 1, *De exercitoria actione; L.* xiv, *tit.* 2, *De lege Rhodia de jactu; L.* xxii, *tit.* 2, *De nautico fœnore; L.* xlvii, *tit.* 5, *Furti adversus nautas,* &c.; *L.* xlvii, *tit.* 9, *De incendio, ruina, naufragio,* &c. (*Azuni's Maritime Law,* i, 296 *et seqq.; Boucher, Consulat,* &c. *t.* i, *p.* 25 *et seqq.*) These titles, with the commentators on them, will be found to be of the very first utility to the commercial jurist. A translation of these titles into English is contained in *Hall's Law Journal.* (See also *Hall's Emérigon, ap.*)

'During the middle ages, as commerce revived in the different states bordering on the sea, each one, for a time, followed its own peculiar usages,—for laws they had none at this period of ignorance and superstition. As these states increased in wealth and power, their maritime usages began to assume a more distinct form, and were at last wrought into several written codes. These codes were not created in a moment, nor were they acts of peculiar legislative wisdom; but the principles in them slowly grew

up in the courts and commercial practices of several countries, and acquired confirmation from experience. (*North Am. Rev.* vii, 328, 329.)

The first modern code of sea-laws was compiled in the latter part of the eleventh century by the people of Amalphi, one of those numerous cities in Italy, which attained so much wealth and eminence in the pursuit of maritime commerce. (*Park, Sys. of Insurance, int. p.* 24; *Marshall, Treat. on Insurance, p.* 11; *Azuni's Maritime Law*, i, 376.)

Other states bordering on the Mediterranean followed the example of Amalphi; and in a short time one of them produced the curious and valuable collection of sea-laws called the Consulate of the Sea, which was probably compiled about the time of the crusades, (*Grotius, de Jure Belli, l.* 3, *c.* 1, *s.* 5; *Marquardus, De Jure Mercat. c.* 5, n. 59; *Vinnius, ad Digest.* xiv, 1, 2, *p.* 190; *Crusius, Opusc. Com. in leg. Rhod. de jactu;*) but by whose authority is altogether uncertain. The prevailing opinion is that, which traces its origin to Barcelona. (*Capmany, Codigo de las Costum. Mar. de Barcelona, disc. del. edit.; Idem. Mem. sobre la Marina, Commercio y Artes de Barcelona, pt.* ii, *lib.* 2, *cap.* 2, *p.* 107 *et seqq; Boucher, Consulat de la Mer, tom.* i, *liv.* 1. See however *Azuni's Maritime Law, pt.* 1, *ch.* 4, *art.* 8.) Wherever it was written, it soon attained great celebrity, and in the eleventh and twelfth centuries became the maritime law of the whole Mediterranean. (*Targa, Ponderazione, c.* 96; *Emérigon, Des Assurances, préf.; Casaregis, Disc.* 4, 6, 19, & 213. *North Am. Rev.* vii. 329; *Lubeck, De Jure Avariæ, p.* 110; *Card. de Luca, de Credito, dis.* 107. *n.* 6.) The title of this remarkable collection was derived from the name of *consulate*, which then belonged to the maritime courts in the South of Europe. (*Ducange, Gloss. s. voc. Consul; Azuni's Maritime Law*, i, 331; *Boucher, Consulat, t.* i, *p.* 579 *et seqq.*) Some difference exists among learned men as to the value of the Consulate, and all agree that it is a confused, inexact, and ill-arranged collection. (*Hubner, De la Saisie des Bâtimens neutres, dis. prél. p.* 11; *Bynkershoek, de Reb. Bellic. c.* 5, *Duponceau's tr. p.* 44.) Indeed it would be absurd to suppose that, at the time when it was compiled, any considerable judgment in selecting, skill in arranging, or precision in expressing nautical usages, could have been possessed by men just emerging from total barbarism. The single merit of it is, that, among many trivial and many unjust rules, it contains some of obvious utility and importance, which experience suggested and sanctioned. (*North Am. Rev.* vii. 330; *Marshall on Insurance, p.* 15, 16; *Park on Insurance, int. p.* 25; *Valin, Nouveau, Commentaire préf.*; *Peters' Adm. Decis.* i, 106; *Azuni's Maritime Law, ubi supra.*) At present, however, it is interesting

chiefly as an object of curiosity; because it has been superseded, by more valuable codes; since the very wisdom of its provisions by causing them to be sought after and adopted by legal writers and legislators, has proved the means of rendering the study of them unnecessary. The oldest known version of the Consulate is in the dialect of Catalonia, from which it was translated into Spanish, Italian, German and French. Some of the most eminent modern jurists have published editions of the Consulate, Casaregis in Italian, Westerven in Italian and Dutch, and Capmany in Spanish. The best edition is the translation in French by Boucher, which is preceded by a volume of very learned, but crudely compiled, illustrations. (*Boucher, Consulat de la Mer, 2 tom. in 8vo, Paris,* 1808.)

At the same time that the customs of the sea inserted in the Consulate were in credit on the coast of the Mediterranean, Elinor, duchess of Guienne and queen of England, soon after her return from the Holy Land, drew up a compilation of judgments, entitled the Roll or Judgment of Oleron, from the name of her favorite island, which her son Richard afterwards augmented and promulgated as the maritime law of Guienne and England. (*Cleirac, Us et Coutumes de la Mer, p.* 2; *Sea-Laws, p.* 116, 118; *Selden. de Dominio Maris. c.* 24; *Morisot, Histoire de la Marine, l.* 1, *c.* 18; *Fontanon, Ordon. Roy. tom.* iii, *p.* 865; *Blackstone's Com.* iv, 423; *Peters' Adm. Decis.* i, *ap. p.* 3; *Schomberg's Obs. on Rhod. Law. p.* 88; *Park on Insurance, int. p.* 26, 27; *Boucher, Consulat, t.* i, *c.* 18—20.) The Roll of Oleron was amended and published anew by John, Henry III and Edward III, and, as contained in the Black Book of the Admiralty, constitutes the basis of the admiralty law of England. (*Brown's Civ. and Adm. Law,* ii, 40.) As it was originally compiled for the dutchy of Guienne, then a great fief of the kingdom of France, and compiled by a vassal of the crown, it has always been claimed as their own by the writers of France. (*Emérigon, Des Assurances, préf.; Valin, Nouveau Commentaire, préf. p.* 377 *et seqq.*) The Judgment of Oleron was composed in Gascon French. It forms the first part of *Cleirac's Us et Coutumes de la Mer,* who has accompanied it with an excellent commentary. An English translation of it was published in the *Sea-Laws,* (*p.* 120 *et seqq.*) and republished in *Peters' Admiralty Decisions.* (*vol.* i, *ap. n.* 1.)

The next important collection of sea-laws is that of the Ordinances of Wisbuy. Wisbuy was formerly a rich and powerful city in the Swedish island of Gothland, and the most renowned market and fair in the North of Europe. (*Olaus Magnus, Histor. lib.* x, c. 16; *Sea-Laws, p.* 124; *Peters' Adm. Decis.* i, *ap. p.* 69; *Emérigon, Des Assurances, préf.* 11; *Boucher, Consulat,* &c.

ubi supra.) The history of its rise and of its fall is alike buried in obscurity, and no monument of its magnificence remains except its maritime regulations, which acquired the authority of a public law in all the countries beyond the Rhine. *(Grotius, Mare Liberum; Loccenius, de Jur. Marit. præf.)* The precise date at which these Ordinances were compiled is unknown; some writers even placing them before the Consulate of the Sea; *(Kuricke, Jus. Mar. Hans. p.* 681; *Lubeck, De Avar. p.* 105.*)* but the most probable opinion is, that they appeared some time after the Judgment of Oleron. *(Boucher, Consulat, t.* i, *c.* 21, 25; *Valin, Commentaire, préf.; Cleirac, Us et Coutumes, p.* 3, & 161; *Azuni's Maritime Law,* i, 381—385; *Bouchaud, Théorie des Trait. de Commerce, c.* lx, *s.* 3; *Park, Syst. of Insurance, int. p.* 29.*)* Cleirac has published them in French in the *Us et Coutumes,* from which they were translated into English by the author of the *Sea-Laws,* where they may be found, *(p.* 175 *et seqq.)* as likewise in *Peters' Admiralty Decisions. (Vol.* i. *ap. p.* 69 *et seqq.)* They are likewise contained in *Verwer's Nederlandts See-Rechten,* accompanied with annotations.

The precise date of the preceding codes is uncertain; but the subsequent compilations were made in periods better known to history. In 1434, *(Marshall, Treat. on Insurance, p.* 20.*)* the *prud' hommes,* that is to say, the municipal magistrates of Barcelona, published divers regulations on marine insurance, quoted as the Regulations of Barcelona. They are usually printed together with the Consulate of the Sea. *(Emérigon, Des Assurances, préf. p.* 12.*)*

In 1551, Charles V published regulations concerning maritime commerce at Brussels, which were afterwards improved by his son Philip. They are denominated the Caroline Laws. *(Emérigon, Des Assurances, préf. p.* 12, 13.

At the end of the sixteenth and beginning of the seventeenth centuries appeared the Laws of the Hanse-Towns. The nature of this confederation, the celebrity it acquired and the opulence of the towns composing it, are too well known to need repetition. In 1591 the deputies of the towns in the league assembled at Lubeck, and enacted a system of regulations for the government of their extensive commerce. They are printed in French in the *Us et Coutumes de la Mer, (p.* 186,) and in English in the *Sea-Laws, (p.* 195 *et seqq.)* and in *Peters' Admiralty Decisions. (Vol.* i, *ap. p.* 96 *et seqq.)* Afterwards in 1714 the consuls and deputies of the same free cities again assembled and published more copious and improved regulations than the first, which, now that the Hanse-Towns are comparatively speaking obscured by the might and wealth of other cities, which have grown up around them, will ever endure as testimonies of their early reputation, wisdom and

splendor. *(Emérigon, Des Assurances, préf. p.* 13; *Sea-Laws, p.* 190—194; *Peters' Adm. Decis.* i, *ap. p.* 93—95; *Schomberg's Obs. Rhod. Laws, p.* 106; *Park's Syst. of Insurance, int. p.* 50, 51; *Azuni's Maritime Law,* i, 388 *et seqq.)* They are found in German and Latin, together with a learned commentary, in the *Jus Maritimum Hanseaticum.*

Beside these principal ancient marine regulations, Philip II, in 1593, enacted an Ordinance for the Insurances of the Exchange of Antwerp, and in 1598 the city of Amsterdam compiled a Custumary of Insurances, both of which are printed in the *Us et Coutumes de la Mer. (Emérigon, Des Assurances, préf. p.* 14; *Cleirac, Us et Coutumes de la Mer, pt.* ii; *Verwer's Nederlandts See Rechten.)*

The last code of old maritime laws deserving attention is the Marine Ordinance of Louis XIV. Superseding all former laws on the subject, and incorporating into itself all that was most admirable in other ordinances, it merits a more detailed notice in this place, from the constant reference to it in the preceding treatise by Pothier. Among the numerous projects of national aggrandisement entertained by Louis XIV, that for extending the commerce of his kingdom was early conceived and assiduously promoted by every means in his power. Colonial establishments were increased and regulated by him, navigation was encouraged, manufactories were established, the administration of justice and of the finances was reformed, and, as a certain method of attaining his object, a new code of marine rules and decisions was promulgated. *(Ordon. de la Marine, préamb.)* The design of it is attributed to the genius of Colbert. *(Sea-Laws, p.* 250.*)* This enterprising minister caused all the marine laws of his own and of other countries to be drawn together, carefully collated, explained by citations from all the writers on the subject, and illustrated by the annotations of those learned men employed in the work. In the mean time the Marquis of Thibouville *(Henri Lambert)* received a commission authorizing and requiring of him to visit all the harbors and maritime towns of the kingdom, to inquire into the laws, rules and usages there prevailing, and to examine the registries and collect the decisions of admiralty courts. The materials obtained by this laborious process were next digested and abridged, then submitted to the perusal of merchants and advocates, and, when improved by the addition of new regulations adapted to the state of the country and the views of the king, promulgated in 1681 as the sole authentic marine laws of the kingdom of France. *(Valin Nouveau Commentaire, préf.; Emérigon, Des Assurances, préf.; Peters' Adm. Decis.* ii, *ap.)*

Who was the able writer of this Ordinance it is impossible to determine with certainty; for, although several persons have been named as such, Valin confidently denies that there is any evidence to prove either of them entitled to the honor. Whosoever he may have been, every author of every nation allows, that he collected all that was most wise, most useful and most important in the maritime usages of Europe. The indisputable justice of the general principles of this Ordinance, the precision and comprehensiveness of its language, and the methodical nature of its arrangement, gave it the greatest authority, not merely in France, where it was so long the law of the land, but in every country which esteemed sound laws or aspired after superiority on the seas. (*Marshall on Insurance, p.* 18; *Abbott on Shipping, pref.; North Am. Rev.* vii, 340; *Park, Sys. of Insurance, int. p.* 33.)

ART. II.—*On the complaints in America against the British Press. An Essay in the New London Monthly Magazine for February*, 1821.

THE laws of reviewing, like the laws of war, seem to have provided some small alleviations for the inherent cruelty of the pursuit. In war, it is considered honorable and lawful, to storm a town and put man, woman, and child to the sword; and to turn armies into a defenceless district and subsist them on the plunder of a ruined peasantry is a practice, if not formally authorized by the international code, far too common to be thought strange. But to poison wells and massacre unarmed prisoners are held highly inhuman and barbarous; and it takes a good deal of patient reasoning on the one hand to reconcile a person of timid nerves to an unrestrained use of Congreve rockets, charged 'with tartarean sulphur and strange fire,' or to bring him wholly to feel delight, on the other hand, in the torpedo that floats unsuspiciously down beneath the surface of the waters, and blows up a frigate in the dark. So in reviewing, and we may say periodical and anonymous writing in general, to judge from the most respectable precedents on both sides of the water, a pretty wide range is authorized by the common law of the literary republic; and it is permitted under the names of remark, stricture, observation, and reply, to mix up a good share of heterogeneous materials, and to make tolerably free use of that particular figure of speech,